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Supreme Court of the United States.

OCTOBER TERM, 1967.

LOCAL 254, BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petition for Writ of Certiorari.

Local 254, Building Service Employees International Union, AFL-CIO, petitions for writ of certiorari to review the judgment of the Court of Appeals for the First Circuit dated April 10, 1967.

Opinions Below.

The decision and order of the National Labor Relations Board is set forth at R.I, 1-2, and in 151 N.L.R.B. 341. The prior opinion of the Court appears at R.I, 123-129, *National Labor Relations Board* v. *Local 254, Building Service Employees International Union, AFL-CIO,* 359 F. 2d 289. The

decision in this case granting a petition for adjudication in civil contempt is appended at R.I, 335-343.

Jurisdiction.

Jurisdiction is invoked under 28 U.S.C. § 1254(1), and Section 10(e) of the National Labor Relations Act.

Question Presented.

Whether a Union is in contempt of a Court decree based on the language of Section 8(b)(4)iiB when it peacefully distributes leaflets appealing to customers and the public for support in a labor dispute.

Statutes Involved.

The National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*).

Statement of the Case.

The Local 254, Building Service Employees International Union, represents janitorial and cleaning workers hired by contract cleaners. Herbert Kletjian, a contract cleaner doing business as University Cleaning Company, is engaged in the business of furnishing cleaning and janitorial services for commercial and industrial concerns. Most of this work is done at night after regular hours. At one time University had a contract with the Union, but in 1963 this contract was not renewed. University's employees do not receive the same wages, hours and working condition bene-

fits that the Union has obtained by collective bargaining from rival contract cleaners.

In March and April of 1963 the Union approached two customers of University, United Airlines and A & P, and advised them that University was non-union and was undermining wage rates. Subsequently the Union picketed these establishments. Pickets carried signs reading: "The contract cleaners employed here are not members of Local 254, AFL-CIO."

In its first decision, at 359 F. 2d 289, the Court upheld the National Labor Relations Board in holding this conduct a violation of the Act. The Court pointed out that the conversations with United in which the Union stated that it would picket unless a Union cleaner were employed was a "threat" in violation of Section 8(b)(4)iiB of the Act.

The Court of Appeals enforced the order of the Board. Following the language of Section 8(b)(4)iiB of the National Labor Relations Act the Union was required to—

> "Cease and desist from threatening, coercing, or restraining United Airlines, the Great Atlantic & Pacific Tea Co., or any other person similarly engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require them to cease doing business with Herbert Kletjian d/b/a University Cleaning Co."

The adjudication finding the Union in civil contempt arose out of Union conduct which occurred during the period from August to mid-September, 1966. In August usually one and occasionally two Union members, who took turns wearing a sign and distributing leaflets, appeared on an intermittent basis in front of the Craftsman Insurance Company in Boston and the Lewis Shepard Company

in Watertown. The handbills and the sign carried the same message, which read as follows: (R.II, 146):

"UNFAIR

UNIVERSITY CLEANING COMPANY IS AN UNFAIR CLEANER. UNIVERSITY CLEANING COMPANY DOES NOT MEET THE UNION STANDARDS.

Lewis Shepard Products Inc. Watertown, American Electroplating Co, Harding & Gross Inc. Seal-Rite of Cambridge and Craftsmen Insurance, Boston are using the services of this unfair cleaner.

This statement is directed to customers and the public only. It is not a request to employees to refuse to pick up, deliver or transport or refuse to perform any services.

B.S.E.I.U. Local 254 AFL-CIO"

The Union admitted that this leaflet had been copied from the one which appeared in *Great Western Broadcasting Corp.* v. *National Labor Relations Board,* 356 F. 2d 434. That leaflet read:

"KXTV Unfair

Grier Chevrolet Co. Rainbo Baking Co. Shell Oil Co. and Burgermeister Brewing Co. utilize the services of this station.

This statement is directed to customers of the above advertisers. It is not a request to employees to refuse to pick up, deliver or transport or refuse to perform any service."

There was no evidence of any interference with deliveries, no evidence of work stoppages, no evidence of any interference with ingress or egress or any other acts or

signals in connection with the distribution of these handbills. The Union activity is illustrated by the pictures in the record (Exs. 1, 2, R.II, 332, 333). It was limited to times when no employees were entering and leaving. The Court held that this peaceful conduct constituted civil contempt of the Labor Board order which it had enforced.

At a later date, January, 1967, the Union picketed the Massachusetts Department of Education. These pickets carried signs stating that the Department was unfair to the Union. This involved the awarding of a cleaning contract by the Department to University. The Court refused to find that this conduct constituted contempt.

Reasons for Granting the Writ.

The decison below raises important questions on the enforcement procedures and substantive interpretation of a critical section of the National Labor Relations Act. Section 8(b)(4)iiB has been involved in many Board and Court cases of national importance. It involves the regulation of conduct bordering the free speech guaranties of the First Amendment. *National Labor Relations Board* v. *Fruit & Vegetable Packers & Warehousemen, Local 760,* 377 U.S. 58. *National Labor Relations Board* v. *Servette, Inc.,* 377 U.S. 46. The opinions in these decisions indicate that further evaluation is required in determining the limits of the statutory ban against handbilling and picketing conduct and the constitutional protection of the First Amendment for these activities.

The developing cases in this field have created a difference between Circuits. The decision of the Court of Appeal for the Ninth Circuit in *Great Western Broadcasting Corp.* v. *National Labor Relations Board,* 356 F. 2d 434, affirming 150 N.L.R.B. No. 46 on remand from 310 F. 2d

591, involved leaflets copied by this Union but resulting in an opposite decision. See also *Cedar Crest Hats, Inc.*, v. *United Hatters, Cap & Millinery Workers International Union, AFL-CIO*, 362 F. 2d 322 (5th Cir.).

I. The Decision of the Court of Appeals Rests on an Invalid Presumption that Peaceful Appeals to Customers and the Public Constituted Threats, Coercion or Restraint.

The decision of the Court below rests on an erroneous construction of the Act. The Court finds that the presence of two men who usually alternated wearing a sign and passing out handbills in the vicinity of Craftsman Insurance and Lewis Shepard building constituted picketing and constituted "threatening, coercing or restraining" in violation of the Act.

At page 3 of the opinion the Court dismisses the Union contention that this conduct came within the proviso of Section 8(b)(4)B. The proviso states:

> "nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public including consumers and members of a labor organization that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods or not to perform any services at the establishment of the employer engaged in such distribution."

The Court finds that distributing leaflets is picketing, and rejects all other arguments based on the proviso.

The Court continues on page 4 of the opinion to disregard the statements in evidence that the Union picketed at these locations of existing customers in order to reach potential customers of University. The opinion states: "We find this contention a transparent afterthought. . . . [it] strains credulity." With this characterization of the evidence the Court proceeded to substitute its own conjectures for the evidence. The opinion continues:

> "We might add that we think it far more likely, if the union was thinking of prospective customers of University at all, that it thought of them in *in terrorem* terms, viz., that it was informing them that if they employed University they, too, could expect to be an object of secondary picketing. Since such future picketing would itself be forbidden by our order, obviously this could not be a protected informational activity."

This presumption that peaceful leaflet distribution is forbidden by an order that on its face bans "threatening, coercing and restraining" effectively rejects the construction of this language by this Court in both *National Labor Relation Board* v. *Servette, Inc.*, 377 U.S. 46, and *National Labor Relations Board* v. *Fruit & Vegetable Packers & Warehousemen, Local 760* (*Tree Fruits*), 377 U.S. 58.

Prophetically as early as 1896 Mr. Justice Holmes pointed out in *Vegelahn* v. *Guntner*, 167 Mass. 92, at 96 and 105:

> ". . . the patrol, as far as it confined itself to persuasion and giving notice of the strike, was not unlawful . . .

> "It appears to me that the judgment of the majority turns in part on the assumption that the patrol necessarily carries with it a threat of bodily harm. That assumption I think unwarranted . . . Furthermore, it cannot be said . . . that two men walking together up and down a sidewalk and speaking to those who enter a certain shop do necessarily and always thereby convey a threat of force."

Curiously, the Court of Appeals in Judge Aldrich's opinion admits that the peaceful picketing of the Massachusetts Department of Education by the Union does not, in the absence of specific evidence of threats, coercion or restraint, constitute an automatic violation of the Act or the Court decree. Yet in the same decision the Court, in the absence of such specific evidence, finds even more restrained conduct at Craftsman and Lewis Shepard a contempt of its decree.

II. The Decision of the Court of Appeals Deprives the Union of the Rights Guaranteed by the First Amendment of the Constitution.

The Union raised the question of free speech at every opportunity, but the Court of Appeals ignores this issue until page 8 of its opinion, where "the guarantees of the First Amendment" receive a passing reference. Apparently the Court concedes that the free-speech protection could apply to the peaceful Union conduct before the Board of Education. It refuses to admit the possibility that the same protection covers the peaceful Union conduct in distributing leaflets before private employers.

Chief Justice Stone in *United States* v. *Hutcheson*, 312 U.S. 219, stated at 243:

> ". . . publication, unaccompanied by violence, of a notice that the employer is unfair to organized labor and requesting the public not to patronize him is an exercise of the right of free speech guaranteed by the First Amendment which cannot be made unlawful by act of Congress."

In this case the Union peacefully distributed such a notice inviting sympathetic action on the part of the public to help it maintain the minimum work standards which University was undermining. This was the exercise of rights guaranteed by the First Amendment. *Hague* v. *C.I.O.*, 307 U.S. 496. *Thornhill* v. *Alabama*, 310 U.S. 88. *Carlson* v. *California*, 310 U.S. 106. *American Federation of Labor* v. *Swing*, 312 U.S. 321. *Bakery Drivers Local* v. *Wohl*, 315 U.S. 769. *Cafeteria Employees Union, Local 302* v. *Angelos*, 320 U.S. 293. *Thomas* v. *Collins*, 323 U.S. 516. *National Labor Relations Board* v. *Servette, Inc., supra. National Labor Relations Board* v. *Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits), supra.*

As these cases attest, this Court has taken every opportunity to reiterate the principles of freedom of speech. Only considerations of greatest urgency can justify restrictions on this right. *Speiser* v. *Randall*, 357 U.S. 513. In this case there has been no showing of facts which might justify such a restriction. A careful analysis of the opinion shows that peaceful Union appeals truthfully advising the public concerning the facts of a labor dispute were construed by the Court to warrant a citation for contempt rather than constitutional protection.

Conclusion.

This is an appropriate case for this Court to grant the petition for certiorari to the Court of Appeals for the First Circuit. The great importance of the national issues involved in the construction of this section of the Act and the opportunity to define the line of constitutional protection afforded by the First Amendment warrant review of the decision below.

ARTHUR V. GETCHELL,
Attorney for Petitioner.

HAROLD B. ROITMAN,
Of Counsel.